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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-419

STATE OF ARIZONA,

Petitioner,

against

MARICOPA COUNTY MEDICAL SOCIETY,
MARICOPA FOUNDATION FOR MEDICAL CARE, and
PIMA FOUNDATION FOR MEDICAL CARE,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL RETIRED TEACHERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER AND STATEMENT OF INTEREST OF AMICI CURIAE

The American Association of Retired Persons (AARP) and the National Retired Teachers Association (NRTA), of 1909 K Street, N.W., Washington, D.C. 20049, respectfully move the Court pursuant to Rule 36 of the Rules of the United States Supreme Court for permission to file the attached brief amici curiae on a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The grounds for this motion, which grounds also disclose the interest of the amici, are set forth below.

AARP and NRTA are affiliated and jointly administered not-for-profit membership corporations of more than

12,500,000 persons over the age of 55. This figure represents approximately one out of four people over the age of 55 nationwide, the largest organized group of older Americans in the country. Among the purposes of AARP are: to enhance the quality of life for older persons; to promote independence, dignity and purpose for older persons; to lead in determining the role and place of older persons in society; and to improve the image of aging. Among the purposes of NRTA are: to promote the social welfare, and needs of retired teachers, administrators, and all other persons eligible for membership; to improve the quality of life for retired teachers, school administrators, and all older Americans, to the end that aging is achieved with independence, dignity and purpose; and to sponsor research on physical, psychological, social, economic and other aspects of aging.

AARP and NRTA, together, have over 182,000 members in the State of Arizona. A total of 289,000 people over 65 live in Arizona, making up 11.8% of the state's population. Arizona's elderly population is growing more rapidly than that of any other state.

The State of Arizona filed its Petition for a Writ of Certiorari to the United States Court of Appeals, not only on its own behalf, but as *parens patriae* on behalf of its resident natural citizens, seeking reversal of the denial of declaratory and injunctive relief against the establishment and use of uniform and agreed upon schedules by medical doctors in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The question presented by the Petition is whether an agreement among competing physicians establishing fee schedules for their individual services is a *per se* violation of Section 1 of the Sherman Act.

As retired persons, members of AARP and NRTA generally live on relatively fixed incomes and, because of their

advanced age, many also depend on regular or frequent health care for their continued well being. Because of the need to limit the already high, and rapidly increasing, cost of health care, including physicians' fees, this case is especially critical to the health and welfare of AARP and NRTA members and of all older Americans.

The elderly spend a far greater amount *per capita* on health care each year than younger persons. In 1979, the average annual health care expenditure for persons over 65 was $2,257 or 3½ times the average amount for citizens under 65. While older Americans comprise only 11.2% of the population, they spend 29% of the total nationwide expenditure for personal health care.[1]

In 1979, $40.6 billion, or 19% of total national health care expenditure went directly for doctors' bills, approximately $180 per person. Persons over the age of 65 visit a physician an average of 6.3 times per year compared with the average of 4.8 times for individuals generally.[2] The elderly require physicians' services not only more frequently, but for more complicated and therefore more expensive treatment than the average individual.

Compounding the rate of increase in doctors' fees is the increase in out-of-pocket costs to older Americans for services rendered by these doctors. Only 46% of physicians accept Part B medicare reimbursement as payment in full for their services. Older Americans must assume substantial costs in the form of Medicare deductibles, coinsurance and fees in excess of the Medicare "reasonable-charge" reimbursements for doctors' services. For Americans over the age of 65, a full 41.8% of physicians' services are paid for privately.[3]

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1. Gibson, *National Health Expenditures 1979*, 2 HEALTH CARE FINANCING REVIEW 1 (Summer 1980); Fisher, *Differences By Age Groups in Health Care Spending*, 1 HEALTH CARE FINANCING REVIEW 4 (Spring 1980).
2. *Id.*
3. *Id.*

Indeed, precisely because of their concern over the high cost of medical care, and specifically the anti-competitive nature of the health care industry of which physicians form a significant segment, amici and their members have worked to promote and encourage competition in the health care marketplace and to make competition among providers a priority in health planning.

Since the over 12.5 million members of the amici (182,000 in Arizona alone), are directly and severely affected by the cost of health care, and because AARP and NRTA have been in the forefront of the battle to open up and stimulate competition in the health care market place, amici have a vital interest in the question of whether an agreement among physicians, fixing prices for their individual services, is a *per se* violation of the Sherman Act.

The amici have been unable to obtain the consent of the respondents to the filing of the attached brief, thus necessitating this motion.

WHEREFORE, AARP and NRTA respectfully move for permission to file the attached brief amici curiae in support of the Petition for a Writ of Certiorari in this matter.

Respectfully submitted,

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BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER

Introduction

The overriding interest of AARP and NRTA in the health care field is to foster and promote efficient delivery to the elderly of the best possible services at the least possible cost, thus making them readily available even for persons living within fixed and limited incomes. AARP and NRTA have advanced and supported introduction of strong cost containment measures, such as negotiated fee schedules and prospective reimbursement, which foster competition in the health care industry, because amici steadfastly maintain that elimination of all anti-competitive barriers is essential if the ultimate goal is to be achieved. To this end, amici have consistently argued before federal and state

legislatures and administrative agencies that the health and medical professions should not be exempt from the antitrust laws and that all existing state or federal antitrust exemptions in the health care field should be abolished.[1]

Instead of reducing the scope of such exemptions, the decision of the Ninth Circuit herein has created what amounts to a *new* exemption for physicians from Section 1 of the Sherman Act. It seeks to justify creation of this new exemption for physicians simply because there already exist anti-competitive characteristics in the health care industry! This is paradoxical at best and dangerous at worst. The absence from the health care field of "ideal competitive conditions"[2] bears no logical relation to a conclusion that physicians' price arrangements in Maricopa and Pima counties are not *per se* contracts or combinations in "restraint of trade".[3]

Fixed and uniform fee-for-service schedules such as those adopted by the physicians in Maricopa and Pima counties,

1. The Health Policy chapter of the AARP-NRTA 1980 Federal and State Legislative Program was introduced into the Congressional Record by Congressman Charles B. Rangel (D-N. Y.), Chairman of the Subcommittee on Health of the House Committee on Ways and Means, on May 19, 1980, 126 CONG. REC. E2471 (1980); in addition, amici have testified and submitted statements to the FTC on April 30, 1980 in respect of "Medical Participation in Control of Certain Open-Panel Medical Prepayment Plans"; to the Senate Finance Committee on April 11, 1980 in respect of "Health Care and the Elderly in the Present Economic Climate"; to the Health Subcommittee of the Senate Finance Committee on March 18, 1980 in respect of The Health Incentive Reform Act of 1980 (S.1968); and to the Health Subcommittee of the House Interstate and Foreign Commerce Committee on February 14, 1978 in respect of the Health Planning and Resources Development Amendments of 1978 (H.R. 10460).

2. *See* Appendix A to the Petition, p. 6.

3. *See* § 1 of the Sherman Act, 15 U.S.C. § 1.

are in diametric opposition to the strong cost containment measures, such as negotiated fee schedules and prospective reimbursement, that amici have advanced in their endeavor to promote competition in the health care field. These measures involve pre-encounter budgeting for patient care and hold the physician accountable for expenditures in excess of the budget, thereby giving health care consumers, more often than not older people, some control over the cost of treatment.

The consequence of the Ninth Circuit's decision will be to encourage, more firmly than ever, that physician groups may with impunity control third-party payor plans. The result of such judicially condoned unfair and anti-competitive trade practices can only be inevitably to reduce and eliminate competition and to aid physicians in achieving target level incomes at the expense of consumers of health care services who are, disproportionately, older Americans.

ARGUMENT

Amici respectfully join in the legal argument advanced by the Petitioner and by the states of Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and the Commonwealths of Kentucky and Massachusetts as amici curiae in support of the Petitioner. We respectfully highlight below several points of direct concern to AARP and NRTA.

I.

THE NINTH CIRCUIT'S CREATION OF A SPECIAL ANTITRUST EXEMPTION FOR HORIZONTAL PRICE FIXING AMONG PHYSICIANS THREATENS TO DESTROY ANY CHANCE FOR HEALTH CARE COST CONTAINMENT.

The opinion of the Ninth Circuit upholds an exemption for physicians from established antitrust standards of enforcement, because, it said it was "confronted with an industry widely deviant from a reasonably free competitive model."[4]

In other words, says the Ninth Circuit, because no competition exists now, it is acceptable to permit admittedly anti-competitive practices to continue unchecked. But it is these very anti-competitive practices which Congress sought to stamp out via the Sherman Act. The fact that the health care field may be markedly anti-competitive cannot be used as a crutch to condone and encourage the carving out of an undesirable exemption from the Sherman Act. The Ninth Circuit opinion threatens to eliminate in one fell swoop all recent Congressional and Federal Trade Commission (FTC) action designed to foster competition, which amici have vigorously supported.[5]

Congress, recognizing the anti-competitive features of the health care field, has denominated the strengthening of competition as a national health priority[6] and has established incentives specifically aimed at fostering competition in the health care marketplace. The FTC, similarly concerned with health care cost containment, is working

4. *See* Appendix A to the Petition, p. 6.

5. *See, e.g.*, 42 U.S.C. § 300k-2(a)(17); FTC, *Medical Participation in Control of Certain Open Panel Medical Prepayment Plans*, 45 Fed. Reg. 17019 (1980) (to be codified in 16 C.F.R. ch. 1); *See also* Footnote 1, *supra*.

6. 42 U.S.C. § 300k-2(a)(17).

to lessen physician control of Blue Shield boards responsible for reimbursement policy and fees.[7] Amici have worked hard to promote implementation of these and other responses to the anti-competitive nature of the health care field.

Judge Sneed's opinion below endows the medical profession with a protected status and creates a dangerous precedent in defense of price fixing by ruling that it is the *reasonableness* of the fixed prices that is determinative, as opposed to the *act* of fixing those prices by contract or agreement, even though that act might otherwise be in direct contravention of § 1 of the Sherman Act. This new "rule of reason" would seem to require that with each change in price, the burden falls on the consuming public to institute suit and seek a court determination on the "reasonableness" of the newly established price list. The opinion ignores the fact recognized by Congress, the FTC and this Court that today's so-called fixed but "reasonable" price will undoubtedly be tomorrow's fixed and unreasonable price.[8]

Furthermore, where it is possible to create a competitive environment, as clearly seems feasible in the health care field, it should not be for doctors or courts to substitute their judgment as to the reasonableness of prices for the normal forces of the market. It is, therefore, not in the public interest that a judicial exemption for the medical profession be permitted to stand or that doctors be permitted to fix prices.

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7. FTC, *Medical Participation in Control of Certain Open Panel Medical Prepayment Plans*, 45 Fed. Reg. 17019 (1980) (to be codified in 16 C.F.R. ch. 1).

8. *See* Footnotes 6 and 7, *supra; See also National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 689 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 212-224 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1927); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340-341 (1897).

II.

OLDER AMERICANS ARE ENTITLED TO PURCHASE AND NEGOTIATE FOR DOCTORS' SERVICES IN AN OPEN, COMPETITIVE MARKETPLACE.

The Sherman Act is a clear enunciation of the consumer's right to negotiate for all goods and services, including physicians' services, at arms-length, in an open, competitive marketplace. This right has been reaffirmed in recent legislation.[9]

The Ninth Circuit's opinion, condoning physicians' price fixing because the prices may be "reasonable", bypasses the relevant statutory inquiry, i.e. has there been price fixing?[10] If there has been price fixing, by definition, competition has indeed been restrained, and consumers of health care, a disproportionate number of whom are older Americans, have thereby been deprived of the competitive market conditions which are desirable to bring them the best health care at the lowest cost.

If the Ninth Circuit's decision is affirmed, it will constitute judicial sanction of the absence of competition in delivery of health care services and will act as a brake on the efforts of amici and others to expand such competition in order to improve the availability and quality of health care for the elderly.

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9. *See, e.g.*, 42 U.S.C. § 300k-2(a)(17).
10. *See* Appendix A to the Petition, pp. 6-7, 31.

CONCLUSION

Amici have a special interest and concern in expanding the limited competitive forces that operate in the health care market. Price fixing arrangements among physicians which can result only in higher health care costs for vulnerable older Americans, and indeed for all consumers of medical services, should not be afforded judicial sanction.

WHEREFORE, amici respectfully request that the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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